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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 760

TRENTON CHEMICAL COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 80–85) is reported at 201 F. 2d 776.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1953, and a petition for rehearing was denied on April 1, 1953 (R. 79, 87–101). The petition for a writ of certiorari was filed on April 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether an Order of the Secretary of Agriculture, allocating grain quotas to distillers and defining "grain" as including "grain products," was invalid as enlarging the scope of Section 4 (b) of the Joint Resolution of December 30, 1947, 61 Stat. 945, 946, which referred to "the use of grain for the production of distilled spirits" with no mention of grain products.

2. Whether it was proper to instruct the jury that petitioner's use of the materials involved with knowledge of its violation of the Order was a wilful violation, without also requiring a finding of bad faith or an evil intent.

STATUTES AND REGULATIONS

The pertinent parts of the statutes and regulations involved are set forth in the Appendix, *infra,* pp. 12–14.

STATEMENT

Petitioner was tried in the United States District Court for the Eastern District of Michigan under an information (R. 3) charging that between December 31, 1947, and January 31, 1948, it knowingly, wilfully, and unlawfully used in the manufacture of distilled spirits barley malt, malt syrup, and grain suspension (starch water) in amounts in excess of those allocated to it, in violation of an Order allocating grain to distillers (12 F. R. 8879, R. 66–70), and contrary to the provisions of Title III of the Second War Powers

Act, 1942, as revived and reenacted. Upon being found guilty by the jury petitioner was fined $7,500 (R. 38–41). On appeal the judgment was unanimously affirmed (R. 43, 79).

Title III of the Second War Powers Act (*infra*, pp. 12–13), which gave the President power to allocate materials necessary for the defense of the United States, expired on June 30, 1947. See Act of March 31, 1947, c. 29, 61 Stat. 34. The Joint Resolution of December 30, 1947, c. 526, 61 Stat. 945, 946, 50 U. S. C. App. [Supp. V] 1914, *infra*, p. 12, reenacted Title III "with respect to the use of grain for the production of distilled spirits" until January 31, 1948, and provided that the authority so granted to the President could, at his direction be exercised by any department, agency, or officer in the executive branch of the Government. The President delegated his authority under Executive Order 9915, issued December 30, 1947 (12 F. R. 8875, *infra*, p. 13), to the Secretary of Agriculture, who on the same date issued an Order entitled "Grain Conservation—Allocation of Grain to Distillers" (12 F. R. 8879, R. 66–70), which established grain quotas for use by distillers.[1] This Order was prefaced with a statement that the "fulfillment of requirements for defense and for essential civilian needs has resulted in a shortage in the supply of grain for

[1] Petitioner's quota of 7,840 bushels of 56 pounds each was designated in Appendix A to the Order (12 F. R. 8881).

defense needs, for private account and for export, and the following order is deemed necessary and appropriate in the public interest and to promote the national defense." The Order defined grain as meaning, "corn, wheat, grain sorghums, barley, rye, granular wheat flour, granular rye flour, or any other grain or grain product used by a distiller in the manufacture of distilled spirits or neutral spirits for beverage purposes." The Order defined wheat as meaning "all classes of wheat and [including] whole grain, grits, flakes, and starch material derived from wheat." (R. 66.)

Upon issuance of the Order telegrams were sent to all distillers advising them of its effectiveness. A telegram dated December 30, 1947, was addressed to petitioner, advising as to its grain quota and stating that a copy of the Order would follow by registered mail. (R. 53, 75.) Petitioner, on January 2, 1948, addressed a letter to the Secretary of Agriculture seeking relief from the Order, but this was denied. (R. 12–18, 52.) Petitioner did not seek administrative review of that denial.[2]

[2] On January 6 petitioner filed a civil suit in the United States District Court for the Eastern District of Michigan praying for injunctive relief against the Secretary of Agriculture in the enforcement of the Order against petitioner (R. 19–22). Since the Order expired on January 31, 1948, and the Secretary had not replied to the civil suit, petitioner dismissed it on February 6 (R. 23).

At a pre-trial hearing on the criminal case petitioner admitted that "it did, at the times and places charged in information, use the materials alleged in the amounts alleged" (R. 5), thus disregarding its quota allocation. It was undisputed at the trial that petitioner had used in excess of its quota during the 31-day period involved approximately the following quantities: barley malt, 449,162 pounds; malt syrup, 72,884 pounds; grain suspension (starch water), 6,510,279 pounds (R. 3, 5, 71–74).

A number of government witnesses testified that the materials used by petitioner, *i. e.* barley malt, malt syrup, and grain suspension (starch water), were grain products (R. 49–50, 51–52). Defense witnesses testified that the materials petitioner used were not grain products, because they had undergone chemical changes to give them identities of their own (R. 55–56).[3]

The trial court refused on the ground of immateriality to permit petitioner to introduce testimony as to its representations to members of Congress and members of the pertinent Congressional committee, while the bill which became the Joint Resolution of December 30, 1947, *infra,* p. 12, was pending, to the effect that grain products should not be included (R. 53, 54; and see R. 5–7). The court refused to allow evidence

[3] Cf. letter of January 17, 1948, from petitioner's president to Senator Flanders, a part of which states, "Our material is undoubtedly a grain product * * *" (R. 25).

that petitioner had been advised by counsel that, since the Joint Resolution did not include grain products, the Order of the Secretary of Agriculture including these products was invalid, and that petitioner could proceed to operate so long as it used only grain products and not grain (R. 53).

In its charge to the jury the trial court adverted to the constitutionality of the legislation giving the President power to restrict the use of grain for the manufacture of distilled spirits, the appropriate delegation of this power to the Secretary, and the validity of the Order promulgated by the Secretary (R. 57). The court told the jury not to be concerned with the niceties of the word wilful "because if the [petitioner] * * * used these materials with knowledge of the Order, with knowledge of the quota allotted to it, and with knowledge that this was in excess of the quota, then it has used these materials wilfully within the meaning of that word in this information" (R. 59). After stating that the nub of the case was whether the commodities mentioned in the information, *i. e.,* barley malt, malt syrup, and grain suspension, were in fact grain as defined in the Order, the charge continued (R. 59):

> If you are satisfied beyond a reasonable doubt that those commodities, or any of them, or any one of them, are grain as defined in the Order, and that particular commodity or commodities so found by you

beyond a reasonable doubt as being grain—that such particular commodity or commodities were used in excess of the quota, and you are satisfied of that beyond a reasonable doubt, then your verdict is one of guilty. If you are not satisfied of those facts beyond a reasonable doubt, as I stated earlier, then your verdict of course must be not guilty.

ARGUMENT

1. Petitioner contends that the Order of the Secretary of Agriculture defining "grain" as including "grain products" was invalid since it enlarged the scope of Section 4 (b) of the Joint Resolution of December 30, 1947, *infra*, p. 12, referring to "the use of grain for the production of distilled spirits" with no mention of grain products (Pet. 16–17).

As the court below pointed out, however, use by Congress of the general term "grain" must have been intended "to include not only grain before being processed, but also products derived from the grain itself" (R. 83). The shortage, which necessitated allocation of available grain to insure conservation of an adequate reserve supply, would not have been alleviated, if, by the simple expedient of converting grain into a grain product to be used for production of distilled spirits, a distiller could remove himself from the purview of the statute.[4]

[4] Petitioner insists that it was not violating the statute, because the wheat clears it used were non-edible products

The Order did not amend or enlarge the statute as petitioner contends, but merely implemented it in harmony with the general policy prescribed in the statute. Cf. *Yakus* v. *United States,* 321 U. S. 414, 424–425.

It is significant that the previous War Food Order 141 (10 F. R. 9381)[5] issued under the Second War Powers Act defined grain in substantially the same manner as the Order here involved. The presumption is that Congress in subsequent legislation used the word grain according to its known and reasonable interpretation. See *Stairs* v. *Peaslee,* 18 How. 521, 526; *Universal Battery Co.* v. *United States,* 281 U. S. 580, 583–584.[6]

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left after flour had been sifted out of the grain (Pet. 19–20). But the clears were clearly a product of grain and it was not petitioner's function to decide for itself how the conservation program would best be effectuated. Moreover, there was testimony that wheat clears were used for feed. (R. 50.) Petitioner offers no such justification for its use of barley products.

[5] § 1468.11 (a) (1): "'Grain' means corn, wheat, grain sorghums, barley, rye, granular wheat flour, granular rye flour, or any other grain or grain product used by a distiller in the manufacture of alcohol or alcoholic beverages or spirits."

[6] Petitioner complains because the trial court did not permit evidence showing that while the Joint Resolution of December 30, 1947, was pending in Congress prior to enactment, its attorney had represented to members of Congress that grain products should not be included (Pet. 17, 19; R. 7, 53). The meaning of the Resolution was, of course, for the court and not the jury to decide. Petitioner's representations have no weight as legislative history for the court to consider, and certainly were not evidence for the jury.

2. A further contention by petitioner is that the trial court erred in instructing the jury that if the petitioner "used these materials with knowledge of the Order, with knowledge of the quota allotted to it, and with knowledge that this was in excess of the quota, then it has used these materials wilfully within the meaning of that word in this information" (Pet. 17, 21–24; R. 59). Petitioner, relying upon *United States* v. *Murdock,* 290 U. S. 389, had asked for, and been denied, instructions that it could not be held guilty of wilful violation unless the jury found a corrupt purpose or an evil intent (R. 35–36).

Even though this Court in *United States* v. *Murdock, supra,* held that the word "wilfully" as used in the statute there involved made bad faith or evil intent an element of the offense, it recognized that the term often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental" and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act" (290 U. S. at 394, 395). Later cases in this Court have held that the word is used in the sense of an act done deliberately and with knowledge, without the requirement of an evil or corrupt purpose. See *e. g., United States* v. *Illinois Central R. Co.,* 303 U. S. 239, 242–243; *Browder* v. *United States,* 312 U. S. 335, 340–342; *Hartzel* v. *United States,* 322 U. S. 680, 686. See also *Spies* v. *United States,* 317 U. S. 492, 497, wherein this

Court said that "* * * willful * * * is a word of many meanings, its construction often being influenced by its context."

Clearly, in the context of a regulatory statute such as was here involved, wilful was used as the District Court defined it. The lower courts have uniformly held that under the Second War Powers Act, wilful means an act done deliberately or intentionally, regardless of any bad faith or evil intent. *Kempe* v. *United States,* 151 F. 2d 680, 688 (C. A. 8); *Gomila* v. *United States,* 159 F. 2d 1006, 1009 (C. A. 6), certiorari denied, 331 U. S. 835; *United States* v. *Klass,* 166 F. 2d 373, 377 (C. A. 3); *Alabama Packing Co.* v. *United States,* 167 F. 2d 179, 182 (C. A. 5).[7] For similar holdings under the Emergency Price Control Act of 1942 see *Zimberg* v. *United States,* 142 F. 2d 132, 137–138 (C. A. 1), certiorari denied, 323 U. S. 712; *United States* v. *George F. Fish, Inc.,* 154 F. 2d 798, 801 (C. A. 2), certiorari denied, 328 U. S. 869; *United States* v. *Stein,* 154 F. 2d 254, 255 (C. A. 2); *United States* v. *Perplies,* 165 F. 2d 874, 876 (C. A. 7).

[7] None of the Court of Appeals cases cited by petitioner as correctly interpreting *Murdock, supra* (Pet. 22–24) involves the Second War Powers Act.

CONCLUSION

The statute involved is no longer operative, and so far as we are able to ascertain no cases arising under it are now pending. The decision of the court below is correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1953.

APPENDIX

The Joint Resolution of December 30, 1947, c. 526, 61 Stat. 945, 946, 50 U. S. C. App. (Supp. V) 1914, provides in pertinent part:

> Sec. 4 * * * (b) Notwithstanding any other provision of law, title III of the Second War Powers Act, 1942, is hereby revived and reenacted for the exercise of the powers, authority, and discretion conferred on the President by such title III with respect to the use of grain for the production of distilled spirits or neutral spirits for beverage purposes. The authority granted by this subsection shall expire on January 31, 1948.
>
> Sec. 5. The authority granted to the President * * * by section 4 of this joint resolution * * * may, to the extent the President directs, be exercised by any department, agency, or officer in the executive branch of the Government.

Title III of the Second War Powers Act, 1942, 56 Stat. 177, provides:

> Sec. 2. (a) * * *(2). * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

Executive Order 9915, issued December 30, 1947 (12 F. R. 8875), provides:

By virtue of the authority vested in me by sections 4 (b) and 5 of the Joint Resolution approved December 30, 1947, entitled "Joint Resolution to aid in the stabilization of commodity prices, to aid in further stabilizing the economy of the United States, and for other purposes," and as President of the United States, the powers, authority, and discretion vested in the President under section 4 (b) of the aforesaid joint resolution, reviving and reenacting Title III of the Second War Powers Act, 1942, for certain purposes, are hereby included within the powers, authority, and discretion delegated to the Secretary of Agriculture under Executive Order No. 9280 of December 5, 1942 (7 F. R. 10179), as amended or modified by Executive Orders No. 9322 of March 26, 1943 (8 F. R. 3807), No. 9334 of April 19, 1943 (8 F. R. 5423) and No. 9577 of June 29, 1945 (10 F. R. 8087).

The said Executive orders are modified accordingly.

HARRY S. TRUMAN.

The pertinent part of the Order issued by the Secretary of Agriculture on December 30, 1947, pursuant to Executive Order 9915, entitled "Grain Conservation—Allocation of Grain to Distillers" (12 F. R. 8879) appears in the record as Government Exhibit No. 1 (R. 66–70).

U. S. GOVERNMENT PRINTING OFFICE: 1950